LEADING COMMON LAW CASES

SECOND EDITION

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AN EPITOME OF LEADING COMMON LAW CASES;

[illegible] Leading Cases [illegible]. By John Indermaur, Solicitor.

LAW WORKS

STEVENS AND HAYNES

AN

EPITOME

OF

LEADING COMMON LAW CASES;

WITH SOME SHORT NOTES THEREON:

CHIEFLY INTENDED AS

A Guide to "Smith's Leading Cases."

SECOND EDITION.

BY

JOHN INDERMAUR,

SOLICITOR

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PREFACE TO SECOND EDITION.

In preparing this Edition the Compiler, acting on the experience gained in reading with his own pupils of what would prove useful to them, and also acting on suggestions made to him, has in various places considerably enlarged the notes to the cases, though still keeping strictly to his original intent of making them very concise. He has only considered it advisable to add one principal case, viz., that of *Lumley* v. *Gye*, on damages, and he has entirely re-written the note on this important subject, endeavouring in it to give some of the most important rules from Mr. Mayne's valuable Treatise on Damages, which he trusts will be found useful. Acting also on suggestions made to him that it would make this little work more acceptable, particularly to non-students, he has in every case added the reference to the original reports in addition to 'Smith's

Leading Cases;' and for the particular use of students blank spaces are left for the purpose of making MS. notes and additions.

J. I.

6, DANES' INN, TEMPLE BAR, W.C.,
April, 1874.

PREFACE.

THE Compiler of this small volume, while reading for his Final Examination, devoted some time to the study of Leading Cases, and it long ago occurred to him that—many articled clerks not having sufficient time to fully peruse the large volumes of 'Leading Cases'—a short Epitome, giving those decisions most important to be read and remembered, would be very useful to them. Besides this, he has long thought that an Epitome might be equally, if not more, useful to those who attentively read the large volumes, for they can after having done so speedily run through a small manual like the present, and impress the chief decisions on their memories. This Epitome professes to nothing particularly original, for it is indeed but an abridgment of the chief decisions in 'Smith's Leading Cases,' with some few additional ones, and some short notes bearing directly on the different decisions. The facts of the different cases are given when they could be

shortly stated, and when they seemed to be of a character likely to serve to impress the decision on the student's memory.

It is sincerely hoped that this Epitome will be found useful for the purpose for which it is intended, viz., as a help to the reading of 'Smith's Leading Cases.'

J. I.

6, Danes' Inn, Temple Bar, W.C.,
February, 1873.

INDEX TO THE CASES EPITOMIZED.

Note.—The edition of 'Smith's Leading Cases' to which reference is made in this Epitome is the 6th, published in 1867.

AN EPITOME

OF

LEADING COMMON LAW CASES,

INTENDED AS

A Guide to "Smith's Leading Cases."

TWYNNE'S CASE.

(*S. L. C., Vol. I., p.* 1.)
(3 *Coke*, 80.)

INFORMATION against Twynne, for making and publishing a fraudulent gift of goods. Pierce was indebted to Twynne in £400, and to C. in £200. Pending an action by C. against Pierce, Pierce being possessed of goods to the value of £300, by deed of gift conveyed them to Twynne in satisfaction of his debt, but Pierce continued in possession of the goods. C. obtained judgment against Pierce, and issued a *fi. fa.*, and Twynne resisted execution.

Resolved:—That the gift was fraudulent within 13 Eliz. c. 5, on the following grounds:—

1. The gift was perfectly general.
2. The donor continued in possession.
3. It was made in secret.
4. It was made pending the writ.

5. There was a trust between the parties, and fraud is always clothed with a trust.

6. The deed contained that the gift was honestly and truly made, which was an inconsistent clause.

Notes.—The rule under the statute of 13 Eliz. c. 5, is that all gifts and conveyances of either chattels or of land made for the purpose of defeating or delaying creditors are void against them unless made upon a valuable consideration and *bonâ fide* to some person without notice of the fraud, and it should be observed that this rule applies not only to creditors to whom the person is indebted at the time, but also immediately afterwards to such an extent that he has not sufficient exclusive of the property so disposed of to pay such debts. Of course, although a conveyance may be fraudulent under the statute, yet as between the parties themselves it is good. The above case was not decided on the ground that there was *no* consideration, for the debt was a sufficient consideration, but on the ground that it was not *bonâ fide*. A debtor has a right to prefer one creditor to another, but he must do so openly, for the law will not allow a creditor to make use of his demand to shelter the debtor, and while he leaves him in *statu quo* by forbearing to enforce the assignment, to defeat the other creditors by insisting on it. It may be observed that the enactments contained in 13 Eliz. c. 5, are simply declaratory of the Common Law.

DUMPOR'S CASE.

(*S. L. C., Vol. I., p.* 30.)
(4 *Coke*, 119.)

Decided:—That where there is a covenant not to alien without license, and that license is once given, the license applies to all future acts of a like nature, so that no alienation afterwards, though without license, is a breach of the covenant.

Notes.—The following was the practical working of the extraordinary doctrine laid down in this case:—A. makes a lease to B., who covenants not to assign without the license of A. A. grants a license to B. to assign to C., and afterwards, notwithstanding the covenant, the term can be assigned to any one. The ground of the doctrine was that every condition of re-entry is entire and indivisible, and the condition, having been waived once, could not be enforced again. Recent legislation has altered this doctrine, it being enacted by 22 & 23 Vict. c. 35, s. 1, that every such license shall, unless otherwise expressed, extend only to the permission actually given, or the actual matter thereby specifically authorized to be done, unless otherwise specified. The subject of an actual waiver of a covenant may here be noticed, for which the above enactment did not provide. An *actual* waiver of a breach of a covenant destroyed the condition of re-entry; but 23 & 24 Vict. c. 38, s. 6, enacts that any actual waiver of a breach of covenant taking place after the passing of that Act (23rd July, 1860), shall *not* be deemed to extend to any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

SPENCER'S CASE.

(*S. L. C., Vol. I., p.* 45.)
(5 *Coke*, 16.)

This was an action of covenant by the lessors of certain property against the assignees thereof, for not building a wall upon the property as the original lessee had covenanted to do. The principal discussion in the case was as to what covenants would run with the land, and the following were the chief points decided:—

1. That where the covenant extends to a thing *in esse* parcel of the demise, the covenant is appurtenant to the thing demised, and binds the assignee without express words, as if the lessee covenants to repair the house demised to him, during the term; but *not* so, if the thing is not in being at the time of the demise.

2. That where the lessee covenants for himself "*and his assigns,*" to do some act *upon the thing demised,* though not in existence at the time of the demise, there, forasmuch as it is to be done upon the land demised, that binds the assignee.

3. But even though the lessee covenant for himself "*and his assigns,*" yet if the thing to be done be merely collateral to the land, and does not in any way touch or concern the thing demised, there the assignee cannot be charged.

Notes.—This case shews the nature of the covenants which will run with the land, by which is meant those covenants as to

which either the liability to perform them, or the right to take advantage of them, passes to the assignee of the land. The better opinion is that at common law covenants ran with the land, but not with the reversion, which rule proceeded upon the doctrine that though an estate could be assigned a contract could not; so that, for instance, if a lessee covenanted to keep his house in repair, and the lessor then sold, he could not assign the benefit of the covenant, so that on breach of covenant by tenant the new landlord could not bring an action in his own name, but all he could do would be to obtain permission from the original lessor to bring it in his name. Of course this is no longer so, for the statute of 32 Hen. 8, c. 34, whilst confirming the common law, that the benefit of covenants relating to the land entered into by the lessor will pass to the assignee, alters the common law by enabling the *assignee of the reversion* to take advantage of the covenants entered into by the lessee with the lessor from whom such assignee claims.

The reason of the passing of the statute of 32 Hen. 8, c. 34, was that at the time of the Reformation, when a large part of the Church lands fell into lay hands, the inconvenience of the law attracted notice, for it pressed hardly on the grantees from the Crown of the lands of the dissolved monasteries, and whilst the enactment was specially created for their benefit it was also made to apply to the whole public. (Elphinstone's Conveyancing, pp. 228, 231.)

As to covenants running with the land in other cases than those between landlord and tenant. Those made *with* the owner of the land to which they relate may be taken advantage of by each successive transferee of the land to which they relate, provided he be in of the same estate as the original covenantee was; but as to those entered into *by* the owner of the land to which they relate, it seems they do not run with the land, but bind only the original covenantor, for if they bound transferees, they would frequently find themselves liable on contracts of which they were ignorant, and which would, if they had known of them, have deterred them from purchasing.

SEMAYNE'S CASE.

(*S. L. C., Vol. I., p.* 88.)
(5 *Coke*, 91.)

The following were the most important points resolved in this case:—

1. It is *not* lawful for the sheriff at the suit of a common person, to break the defendant's house to execute process, but if a defendant flies to or removes his goods to another man's house, the privilege does not extend to protect him there, and, after denial on request made, the sheriff may break the house.

2. In all cases where the king is party the sheriff may break the defendant's house, after request to open the doors.

3. Where a house is recovered in a real action, the sheriff may break the house to deliver possession.

Notes.—It must be remembered that although the sheriff is justified in entering a third party's house to execute process of the law upon defendant or his property, yet if it happen that defendant be not there, or have no property there, the sheriff is a trespasser. When the sheriff has once obtained entry he can break open the inner doors, and where a defendant after arrest escapes, the sheriff may break his house, or the house of any person to which he escapes, to retake him.

It may be useful to state here the law as to arrest and imprisonment under "The Debtors Act, 1869," 32 & 33 Vict. c. 62. The effect of this statute is to abolish imprisonment for debt except in the following six cases:—

1. Default in payment of a penalty not arising out of contract.

2. Default in payment of sums recoverable summarily before a justice.

3. Default by trustees, &c., in paying sums as ordered by the Court of Chancery.

4. Default in payment by attorneys or solicitors of sums ordered to be paid by them as such.

5. Default in payment of a sum ordered to be set aside by a debtor by the Court of Bankruptcy out of salary or income for payment of creditors.

6. Default in payment of sums in respect of which orders are authorized to be made by the Act.

These cases are therefore absolutely excepted, but it is provided that no person shall be imprisoned in any such excepted case for any longer period than one year.

In addition to these exceptions sect. 5 gives any Court power to commit to prison for a period not exceeding six weeks where default is made in payment of a debt due under any order or judgment, provided it is proved that the debtor has or has had since the date of the order means to pay. This power is to be exercised in the inferior Courts only by a judge or his deputy in open Court, shewing on its face the ground on which it is issued; and as to a judgment of a superior Court, only where the judgment does not exceed £50 exclusive of costs. This imprisonment is to be no satisfaction of the debt, and it may be mentioned that under the power here given the judges have required very strict proof of the debtor's means.

As to arrest, sect. 6 provides that in any action in the superior Courts of law where defendant would have been liable to arrest formerly he may be arrested for a period not exceeding six months, unless or until he has given prescribed security not to leave England without leave of the Court, where the plaintiff, at any time before final judgment proves (1) good cause of action for £50 or upwards; (2) probable cause for believing that defendant is about to quit England; and (3), that his absence will materially prejudice plaintiff in prosecution of action; except as to this last proof, where the action is for a penalty other than a penalty in respect of any contract, when it is not necessary, and the proof of the other two facts alone is sufficient.

CALYE'S CASE.

(*S. L. C., Vol. I., p.* 105.)
(8 *Coke*, 32.)

Resolved:—That if a man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done, and the horse is stolen, the innkeeper shall not answer for it. To charge an innkeeper on the custom or common law of the realm for the loss of goods:—(1) The inn ought to be a common inn. (2) The party ought to be a traveller or passenger. (3) The goods must be in the inn (and for this reason the innkeeper is not bound to answer for a horse put out to pasture). (4) There must be a default on the part of the innkeeper or his servants in the safe keeping of the guest's goods. (5) The loss must be to moveables, and therefore if a guest be beaten at an inn, the innkeeper shall not answer for it.

Notes.—An inn is defined as "a house where the traveller is furnished with everything he has occasion for on his way." An innkeeper is defined as "one who professes to supply lodgings and provisions for the night, for all comers who are ready to pay for it," and he is bound to receive a traveller into his house and provide properly for him upon his tendering a reasonable price for the same, unless, indeed, the traveller is drunk or suffers from a contagious disorder. If innkeeper fails in his duty he may be indicted at common law, or is liable to an action on the case (*Fell* v. *Knight*, 10 L. J. (Ex.) 277). A person who professes to let private lodgings only, or to supply provisions only, is not an innkeeper; and if a man come to an inn on a special contract to board and

lodge there, the law does not consider him as a guest but as a boarder. By 26 & 27 Vict. c. 41, an innkeeper is not liable to make good any loss of, or injury to goods (not being a horse or other live animal, or gear appertaining thereto, or any carriage), beyond £30, except (1) Where stolen, lost, or injured, through the wilful neglect or default of the innkeeper, or any servant in his employ; or (2) Where the goods are deposited expressly with him for safe custody; but to entitle the innkeeper to the benefit of the Act, a copy of section 1 must be exhibited in a conspicuous part of the hall or entrance to inn.

An innkeeper, if his bill is not paid, though he cannot detain his guest's person, has a lien on, and may detain goods intrusted to his charge, though they are not the guest's property.

THE SIX CARPENTERS' CASE.

(*S. L. C., Vol. I., p.* 132.)
(8 *Coke*, 146 *a.*)

Here six carpenters entered a tavern and were served with wine for which they paid; they were afterwards, at their request, served with bread and more wine, for which they then refused to pay. Trespass was on these facts brought against the six carpenters, and the only point in the case was whether the non-payment made the entry into the tavern tortious. It was resolved: (1) That if a man abuse an authority given him by the law, he becomes a trespasser *ab initio;* but (2) Where the authority is given by the party and abused, there he is *not* a trespasser *ab initio,* but he must be punished for his abuse. (3) That non-feasance only cannot make the party who has the license by law a trespasser *ab initio,* and therefore in this case the mere non-payment did *not* make the carpenters trespassers *ab initio.*

Notes.—The rule laid down in this case that a man abusing an authority given him by the law becomes a trespasser *ab initio* formerly applied to a distress, but now if any irregularity occurs in making a distress, if any rent is justly due, the distrainer is not a trespasser *ab initio* (11 Geo. 2, c. 19, s. 19).

LAMPLEIGH v. BRAITHWAITE.

(*S. L. C., Vol. I., p.* 139.)
(*Hobart*, 105.)

Decided:—That a mere voluntary courtesy will not uphold *assumpsit*, for to do so, it must be moved by a precedent request of the party who gives the promise, for then the promise though it follows, yet is not alone, but couples itself with the request. Labour, though unsuccessful, may form a valuable consideration.

Notes. — The rule requiring a consideration to support a promise, is, of course, well known, and needs no comment here; but it will be useful to note here that a consideration consists of either: "some benefit to the party making the promise, or to a third person by the act of the promisee, or some loss, trouble, inconvenience to, or charge imposed upon, the party to whom the promise is made."

Considerations which, with reference to their nature, are divided into good and valuable, are also, with reference to time, denoted, executed, executory, contemporaneous, and continuing. An executed consideration will not support an action unless founded upon a previous request express or implied, and this previous request will be implied in the following cases:—

1. Where plaintiff has been compelled to do that which defendant ought to have done and was compellable to do.

2. Where defendant has taken the benefit of the consideration.

3. Where plaintiff has voluntarily done that which defendant was legally compellable to do, and in consideration thereof the latter has afterwards expressly promised to repay or to indemnify him; or, where the act is done voluntarily, but it is of such a nature as to be essential to the public welfare.

4. Where plaintiff has expended money in procuring necessaries for an infant who, on coming of age, expressly promises a sum of money in consideration thereof.

5. Cases of money lent.

6. Where a person, at the request of another, subjects himself to a legal liability to pay money, the law implies a request to the former by the latter actually to pay the money when necessary. (Smith's C. L. Manual, 4th ed., pp. 50, 52.)

Of the above cases the first three are the most important to be borne in mind.

CHANDELOR v. LOPUS.

(*S. L. C., Vol. I., p.* 165.)
(2 *Croke*, 2.)

The defendant sold to the plaintiff a stone, which he affirmed to be a Bezoar stone, but which proved not to be so. This action was brought upon the case, and on error being brought, it was held that no action lay against defendant, unless he either knew that it was not a Bezoar stone, or warranted it to be a Bezoar stone.

PASLEY v. FREEMAN.

(*S. L. C., Vol. II., p.* 71.)
(3 *T. R.* 51.)

Decided:—That a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action, it is *not* necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.

Notes on the two foregoing Cases.—These two cases are placed together as being slightly connected; but although this is so, the differences between them are obvious, for the case of *Chandelor* v. *Lopus* touches as well on the point of warranty, whilst *Pasley* v. *Freeman* only deals with the nature of the false affirmation that

will support an action of deceit. A warranty may be defined as an undertaking, express or implied, arising or given on the sale of goods or chattels. On the question of what amounts to a warranty, it may here be noticed that "every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended." A warranty which is made subsequent to a sale is invalid for want of consideration, unless indeed made upon some fresh consideration. As to the remedy of the vendee of a chattel on breach of warranty, he cannot return it and recover the price if it is some specific article sold, though he may if the warranty is in respect of manufactured goods never completely accepted, and provided he has only given the article a fair trial. In all cases the vendee can give the breach in evidence in reduction of the vendor's claim, or may bring an action against him for the breach.

The decision in the case of *Pasley* v. *Freeman* is subject to the enactment contained in 9 Geo. 4, c. 14, s. 6: "that no action shall be maintained whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain 'credit, money, or goods upon,' unless such representation or assurance be made in writing signed by the party to be charged therewith."

COGGS v. BERNARD.

(*S. L. C., Vol. I., p.* 177.)
(*Lord Raymond*, 909.)

Here the defendant had promised the plaintiff to take up several hogsheads of brandy then in a certain cellar, and lay them down again in a certain other cellar, safely and securely; and by the default of the defendant one of the casks was staved and a quantity of brandy spilt. Verdict for plaintiff on a plea of not guilty, and on motion in arrest of judgment, *Decided*:—That if a man undertake to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for his pains. Lord Holt here classifies bailments as follows:—(1) *Depositum*, or a naked bailment of goods to be kept for the use of the bailee. (2) *Commodatum*, where goods are lent to the bailee *gratis* to be used by him. (3) *Locatio rei*, where goods are lent to the bailee for hire. (4) *Vadium*, pawn. (5) *Locatio operis faciendi*, where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee. (6) *Mandatum*, a delivery of goods to somebody who is to carry them or do something about them gratis.

WILSON v. BRETT.

(11 *M. & W.* 113.)

Decided:—That a party who rides a horse, at the request of the owner, for the purpose of exhibiting and offering him for sale, without any benefit to himself, is bound to use such skill as he possesses; and if proved to be conversant with and skilled in horses, he is equally liable with a borrower for an injury done to the horse, for he is bound to use the skill which he possesses.

Notes on the above two Cases.—These two cases are quoted together, the first as being the leading case on the subject, and shewing the general principle that a gratuitous bailee is chargeable only when guilty of *gross* negligence, and the latter as somewhat limiting that general principle, by deciding that if the gratuitous bailee is in such a situation as to imply skill in what he undertakes to do, an omission to use that skill is imputable to him as gross negligence.

In considering the subject of bailments, we come to that of carriers. A common carrier has been defined as "a person who undertakes to transport from place to place for hire the goods of such persons as think fit to employ him." At the common law carriers were insurers liable for all losses, except those arising from the act of God, or of the King's enemies; and to obviate this liability it became their practice to put up in their warehouses notices limiting their liability, and provided it could be shewn that the customer saw such notice, this was usually held to create a contract between the carrier and the customer. Statute 1 Wm. 4, c. 68, provided that carriers shall not be liable for certain valuable articles therein specified, such as gold, silver, pictures, &c., above £10, unless the nature and value of the article were declared, and an increased rate of charge paid or agreed to

be paid; and that the carrier may demand and receive an increased rate *to be duly notified in his warehouse.* No general notices or conditions are to limit the carrier's liability. But nothing in the Act contained is to prevent a special contract. This statute does not protect the carrier from any loss arising from the felonious act of any servant in his employ. After this Act railway companies frequently escaped its provisions by putting notices on the receipts given to persons sending goods, and this was held to constitute a special contract between the parties: 17 & 18 Vict. c. 31, therefore, provides that no such contract shall be of effect unless signed by the party delivering the goods; but the company may limit its liability by *reasonable* conditions—the reasonableness of such conditions to be decided by the judge before whom the matter comes. This Act also exempts companies from liability for loss of (1) horses beyond the sum of £50, (2) neat cattle £15, (3) sheep and pigs £2 per head, unless a higher value declared, and an increased rate paid or agreed to be paid.

Common carriers are bound to carry all goods delivered to them for carriage provided the price be paid or tendered, and they are of the nature he ordinarily carries, and they are not dangerous, and he has room in his vehicle. If a person delivers dangerous goods to a carrier without informing him of their dangerous nature, he will be liable for any accident arising from them to the carrier, or those who are concerned in the carriage (*Farrant* v. *Barnes*, 11 C. B. (N.S) 553).

ASHBY v. WHITE.

(*S. L. C., Vol. I., p.* 227.)
(*Lord Raymond*, 938.)

At an election of burgesses for Parliament, the plaintiff, being entitled to vote, tendered his vote for two candidates; but such vote was refused, and notwithstanding those candidates for whom the plaintiff tendered his vote were elected, yet he brought this action against the constables of the borough for refusing to admit his vote. *Decided*:—That action was maintainable, for it was an injury, though without any special damage.

Notes.—The above case decides, that although a person has suffered no actual or real damage, yet if he has suffered a legal wrong or injury, capable in legal contemplation of being estimated by a jury, an action lies; but the decision in this case must be carefully distinguished from those cases in which a damage is incurred by the plaintiff, but a damage not occasioned by anything which the law considers an injury. In such cases the party damaged is said to suffer *damnum sine injuria*, and can maintain no action. See, in further exemplification of the above decision and these remarks, the important cases of *Fray* v. *Voules* (1 E. & E. 839), and *Marzetti* v. *Williams* (1 B. & Ad. 415).

BIRKMYR v. DARNELL.

(*S. L. C., Vol. I., p.* 274.)
(*Salkeld*, 27.)

Decides:—That a promise to answer for the debt, default, or miscarriage of another person, for which that other remains liable, is within the statute, but *not* if that other does not remain liable.

PETER v. COMPTON.

(*S. L. C., Vol. I., p.* 296.)
(*Skinner*, 353.)

This was an action upon an agreement of the defendant, in consideration of one guinea paid him, to give the plaintiff so many on the day of his marriage. The marriage did not happen within a year, and the question was, whether or not the agreement must be in writing. *Decided*:—That "an agreement which is not to be performed within one year from the making thereof" means, in the Statute of Frauds, an agreement which, from its terms, is incapable of being performed within the year; and therefore the agreement in this case need not be in writing.

Notes on these two Cases.—The following is the 4th section of the Statute of Frauds (29 Car. 2, c. 3):—"No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the

debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement which is not to be performed within one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The above two cases are therefore on two of the agreements mentioned in the section, viz. guarantees and agreements not to be performed within a year. The case of *Birkmyr* v. *Darnell* is on the point of guarantee, deciding that if the original party remains liable, then the agreement is within the statute, and must be in writing; but if the original party does not, in fact, remain liable, then it is an entirely fresh agreement, and not within the statute; and a guarantee is therefore properly defined as a collateral promise to answer for the debt, default, or miscarriage of another for which that other remains primarily liable. 19 & 20 Vict. c. 97, s. 3, provides that the consideration for a guarantee need not appear on the face of the written instrument (see *post*, p. 52); and the same statute (sect. 4) provides that a guarantee to or for a firm shall cease upon a change in the firm, unless the intention of the parties that it shall continue notwithstanding such change shall appear. The same statute also (by sect. 5) provides that a surety who discharges the liability of his principal is to be entitled to an assignment of all securities held by creditor, although they may be deemed at law to be satisfied by his payment.

The latter case of *Peter* v. *Compton* needs no remark, it well explaining what is meant by an agreement not to be performed within one year from the making thereof, shewing that where on the face of the agreement it is capable of being performed within the year, then it is not within the statute, and need not be in writing; though where, from its very terms, it is incapable of being so performed, then it must be in writing.

PRICE v. EARL OF TORRINGTON.

(*S. L. C., Vol. I., p.* 290.)
(*Salkeld*, 285.)

This was an action for beer sold and delivered, and the evidence given to charge defendant was, that the drayman, in the usual course of business, and in discharge of his duty, had made a note of the delivery of the beer, and set his hand thereto, and that he had since died. *Decided*:—That this was good evidence of a delivery.

HIGHAM v. RIDGWAY.

(*S. L. C., Vol. II., p.* 287.)
(1 *East*, 109.)

In this case it was necessary to prove the precise date of the birth of one William Fowden, and to prove this, an entry made by a man-widwife (since dead), who had delivered the mother, of his having done so on a certain day, referring to his ledger, in which he had made a charge for his attendance, *which was marked as paid*, was tendered. *Decided*:—That this was good evidence.

Notes on these two Cases.—These two cases are here placed together because they are both on the subject of evidence, and because they are sometimes confused by students. The grounds of the decisions are, however, quite distinct; that of *Price* v. *Earl of Torrington* being, that the entry was made in the ordinary course of business, and in the performance of duty; and here it

must be observed, that in this class of cases only so much of the entry as it was strictly the duty of the party to make can be received. But the ground of the decision in *Higham* v. *Ridgway* was, that the entry was against the interest of the party who had made it, and in this class of cases the other facts stated in the entry, though not against the interest of the party making the entry, can be received. Had this not been so, the entry given in evidence in *Higham* v. *Ridgway* would have been inadmissible. The distinction between these two classes of cases is most important and should be well observed.

Other cases in which the statements of persons not upon oath are admissible in evidence are, that in respect of matters of public and general interest, declarations of deceased persons who may be presumed to have had competent knowledge on the subject, are admitted if made before any controversy arose, also matters of pedigree may be proved by declarations of deceased persons connected by blood or marriage with the family, if made before any controversy arose, or by the general reputation of a family. Also see 32 & 33 Vict. c. 68, s. 4 (*post*, p. 30).

CUMBER v. WANE.

(*S. L. C., Vol. I., p.* 301.)
(1 *Strange*, 436.)

Decided:—That giving a note for £5 cannot be pleaded in satisfaction of £15.

Notes.—This means that a smaller sum cannot be given in satisfaction of a greater, though something else might so operate; thus a horse might be given in satisfaction of a debt of £15, though it was not worth even £5. It should be here observed that in this case it does not appear that the note was a negotiable note, and it has since been decided that a *negotiable* security may operate, if so given and taken, in satisfaction of a debt of greater amount: *Sibree* v. *Tripp* (15 M. & W. 23).

ARMORY v. DELAMIRIE.

(*S. L. C., Vol. I., p.* 315.)
(1 *Strange*, 504.)

The plaintiff, being a chimney-sweeper's boy, found a jewel, and carried it to the shop of the defendant, who was a goldsmith, to know what it was. He delivered it to an apprentice, who took out the stone, and the master offered him three-halfpence for it. The plaintiff refused to take it, and insisted on having it returned, whereupon the apprentice delivered him back the socket without the stone; and so the plaintiff now brought an action of trover against the master. *Decided*:—(1) The finder of a jewel may maintain trover for conversion thereof against the wrongdoer, for he has a good title against all but the right owner. (2) A master is liable for a loss of his customer's property intrusted to his servant in the course of his business. (3) When a person, who has wrongfully converted property, will not produce it, it shall be presumed as against him to be of the best description.

Notes.—The chief and important decision in the above case is that numbered (1), shewing that a finder of property has a good title against all except the rightful owner. The evidence to be adduced on the trial of an action of trover is that the plaintiff was in possession of the goods, or had a right of property with the right to immediate possession, that the goods came to defendant's possession, that he or his agent converted them, and their value.

COLLINS v. BLANTERN.

(*S. L. C., Vol. I., p.* 325.)
(2 *Wilson*, 341.)

In this case the plaintiff sued on a bond executed by certain parties, of whom the defendant was one, the obligation of which was £700 conditioned for payment of £350. The defendant pleaded the following facts, which shewed that the consideration though not appearing on the face of the bond was illegal: Certain parties were prosecuted for perjury by one John Rudge, and pleaded not guilty. According to an arrangement the plaintiff gave his promissory note to the prosecutor, John Rudge, he to forbear further prosecuting, and as part of the arrangement the bond on which plaintiff sued was executed to indemnify him. The question was whether such a plea was good. *Decided*:—That the plea was good, for illegality may be pleaded as a defence to an action on a bond.

Notes.—It will be observed that the instrument was an instrument under seal, and that the case decides that though so under seal, and notwithstanding the rule that a contract under seal is binding on the party making it, whether there is a consideration or not, the defendant was not estopped from setting up the illegality.

(As to estoppel, see *post*, p. 70.)

MITCHELL v. REYNOLDS.

(*S. L. C., Vol. I., p.* 356.)
(1 *P. Wms.* 181.)

Here the defendant had assigned to the plaintiff a bake-house, and had executed a bond not to carry on the trade of a baker within the parish for a period of five years, under a penalty of £50. This action was now brought on the bond, and the defendant pleaded that it was void at law. *Decided*:—That the bond was good, as it only restrained the defendant from trading in a particular place, and was on a reasonable consideration, but that it would have been otherwise if on no reasonable consideration, or to restrain a man from trading at all.

MALLAM v. MAY.

(11 *M. & W.* 653.)

By articles it was agreed that defendant should become assistant to the plaintiffs in their business of surgeon dentists for four years; that plaintiffs should instruct him in the business of a surgeon-dentist, and that after the expiration of the term the defendant should not carry on that business in London or in any of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the said service. *Decided*:—That the stipulation not to practise in London

was valid, the limit of London not being too large for the profession in question, and that the stipulation as to not practising in towns where the plaintiffs might have been practising during the service was an unreasonable restriction, and therefore illegal and void; but that the stipulation as to not practising in London was not affected by the illegality of the other part.

Notes on these two Cases.—All contracts in general restraint of trade are, notwithstanding any consideration that may exist, perfectly void, because they tend to discourage industry, enterprise, and competition; and even with regard to contracts in limited restraint of trade, it is important to remember that to render them good they must always be founded on a reasonable consideration, and this notwithstanding that the contract may be under seal, in which we find an exception to the rule that contracts under seal require no consideration. The latter of the above two cases plainly shews that agreements in restraint of trade are divisible, *i.e.* part may be void while part remains good.

SIMPSON v. HARTOPP.

(*S. L. C., Vol. I., p.* 385.)
(4 *T. R.* 568; *Willes*, 514.)

Decided:—Implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises.

Notes.—Distress, which is a remedy by the act of the party, has been defined as the taking of a personal chattel out of the possession of the wrongdoer into the custody of the injured person, in order to procure a satisfaction of the wrong done (3 Stephen's Comms. 356, 5th edit.) It may be useful here to give a statement of things privileged (*a*) from distress, and (*b*) from execution.

(*a*) The following are privileged from distress:—

1. Things in the personal use of a man.
2. Fixtures affixed to the freehold.
3. Goods of a stranger delivered to tenant to be wrought on in the way of his ordinary trade.
4. Perishable articles.
5. Animals *ferœ naturœ*.
6. Goods in *custodia legis*.
7. Instruments of a man's trade or profession, though not in actual use, if any other sufficient distress can be found.
8. Beasts of the plough, instruments of husbandry, and beasts which improve the land, if any other sufficient distress can be found.
9. Loose money.
10. Lodgers' goods, by force of the statute 34 & 35 Vict. c. 79.

(*b*) The following are privileged from being taken in execution:—

1. Wearing apparel and bedding, and implements of trade of any judgment-debtor not exceeding £5.

2. Goods of a stranger.
3. Goods in *custodia legis*.
4. Fixtures affixed to the freehold.
5. (In the case of an elegit). Advowsons in gross, and glebe lands.

OMICHUND v. BARKER.

(*S. L. C., Vol. I., p.* 398.)
(*Willes*, 550.)

The question in this case was whether the evidence of witnesses of the Gentoo religion, and sworn according to that religion, was admissible. *Decided*:—That the evidence was admissible, and that whenever a witness believes in the existence of a God who will punish him in this world, his evidence must be admitted.

Notes.—In later cases it has been decided that to render the evidence admissible, the belief of the witness must be in the existence of a God who will punish in a *future* world. However, now by 32 & 33 Vict. c. 68, s. 4, it is provided than on objection to take an oath in any civil or criminal proceeding, such person shall, if the presiding judge* is satisfied that the taking of an oath would have no binding effect on him, make the following promise and declaration: "I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth;" and the person making such promise and declaration is to be liable for perjury in the same way as if he had taken an oath.

It may be useful here to give a short statement of the law as to the admissibility of witnesses, which now stands as follows:—

6 & 7 *Vict. c.* 85.—No person offered as a witness shall be hereafter excluded by reason of incapacity from crime or interest from giving evidence.

14 & 15 *Vict. c.* 99.—Parties to actions and suits, and the persons on whose behalf same are brought or defended, shall (with certain

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* By 33 & 34 Vict. c. 49, this is to extend to any person or persons having by law authority to administer an oath.

exceptions) be competent and compellable to give evidence; but this is not to render a party charged with a criminal offence able to give evidence for or against himself.

16 & 17 *Vict. c.* 83.—Husbands and wives are to be competent and compellable witnesses, except in criminal cases; but husband or wife not compelled to disclose any communication made during marriage.

32 & 33 *Vict. c.* 68.—Parties in breach of promise cases and adultery proceedings are competent but not compellable, witnesses, but in adultery proceedings are not bound to confess the adultery unless they have given evidence in disproof of adultery.

17 & 18 *Vict. c.* 125, *ss.* 22—27, also contains important provisions as to evidence.

MILLER v. RACE.

(*S. L. C., Vol. I., p.* 468.)
(1 *Burr.* 452.)

Decided:—That the property in a bank note passes like cash by delivery, and a party taking it *bonâ fide, and for value,* is entitled to retain it as against a former owner from whom it was stolen.

Notes.—This case establishes the above principle in favour of all negotiable instruments, that is, instruments the property in which passes by delivery so as to give the transferee a right to sue on them in his own name. But if the party taking the negotiable instrument has been guilty of *mala fides,* he will not be entitled to retain it against the true owner, and gross negligence in taking the negotiable instrument seems to constitute sufficient *mala fides.*

As to other things, a purchaser, if they are stolen, acquires no title unless he bought in market overt and *bonâ fide,* and even then, if an offender is prosecuted to conviction no title is acquired, as they revert on conviction to the owner. If goods are sold by a person who found them, they may be recovered by the owner from the person who bought them.

WIGGLESWORTH v. DALLISON.

(*S. L. C., Vol. I., p.* 539.)
(*Dougl.* 204.)

Decided:—That a custom that the tenant of land, whether by parol or deed, shall have the away-going crop after the expiration of his term, is good, if not repugnant to the lease under which the tenant holds.

Notes.—But if the lease does contain certain stipulations as to the mode of quitting, then, of course, that puts out the custom, and the terms in the lease rule.

KEECH v. HALL.

(*S. L. C., Vol. I., p.* 523.)
(*Dougl.* 21.)

Decided:—That a mortgagee may recover in ejectment *without giving notice to quit*, against a tenant claiming under a lease from the mortgagor made after the mortgage without the privity of the mortgagee.

MOSS v. GALLIMORE.

(*S. L. C., Vol. I., p.* 561.)
(*Dougl.* 279.)

Decided:—That a mortgagee, after giving notice of the mortgage to a tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues after, and he may distrain for it after such notice.

Notes on these two Cases.—It is well to observe carefully the different results appearing from these two cases. The mortgagor having mortgaged his property cannot himself grant any valid lease, and any such lease is in fact a nullity, and being so the mortgagee can of course avoid it altogether; but if the mortgagor before the mortgage made a lease that is perfectly good, and the mortgagee cannot avoid it, but to obtain the full benefit of his security he can give notice to the tenant, and obtain not only accruing rents, but also rent in arrear, towards liquidation of the amount due on his security. The Judicature Act, 1873, contains a somewhat important provision as to mortgagors' powers, viz.

that a mortgagor entitled for the time being to possession when mortgagee has given no notice of his intention to take possession, may sue for such possession or for recovery of rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person (36 & 37 Vict. c. 66, s. 25 (5)).

The different remedies which a mortgagee has, after default, to obtain payment of his mortgage money are as follows:— (*a*) Ejectment against mortgagor and his tenants since mortgage, as decided in *Keech* v. *Hall*. (*b*) Suing on bond or covenant. (*c*) Obtaining rents from tenants prior to the mortgage by giving notice, as decided in *Moss* v. *Gallimore*. (*d*) Selling under the power of sale in mortgage deed, or under the power given by 23 & 24 Vict. c. 145. (*e*) When in possession cutting timber if security insufficient. (*f*) Foreclosing. If a mortgagee forecloses and then sues, the effect of suing is to open the foreclosure and give the mortgagee a renewed right to redeem; and therefore, if mortgagee forecloses and then sells, he cannot afterwards sue, because he no longer has the mortgaged estate ready to be redeemed if the mortgagor should choose to redeem (*Lockart* v. *Hardy*, 9 Beav. 349). But although this is so, yet it is decided that a mortgagee, after selling *under his power of sale*, may sue on the covenant to pay (*Rudge* v. *Rickens*, 28 L. T. 537).

A mortgagee may exercise his different remedies as he pleases, even concurrently. A mortgagor will not be entitled to add to his mortgage debt sums expended at his own motion for general improvement, but he will be allowed to add sums expended for necessary repairs, protecting the title, or renewing renewable leaseholds. But neither a mortgagee nor mortgagor is actually bound to renew a renewable leasehold in the absence of contract so to do.

MOSTYN v. FABRIGAS.

(*S. L. C., Vol. I., p.* 623.)
(*Cowp.* 161.)

This was an action against the Governor of Minorca for trespass and false imprisonment in Minorca, and after verdict for the plaintiff (Fabrigas), the principal question on a bill of exceptions was whether any action could be maintained by a native of Minorca for an injury committed there. *Decided*:—That the action would lie, being of a transitory nature, but that if it had been strictly local no action could have been maintained in England.

Notes.—*Local* actions are those founded on some cause of action which necessarily refers to some particular locality; *transitory* actions are those founded on a cause of action which might be supposed to take place anywhere.

LICKBARROW v. MASON.

(*S. L. C., Vol. I., p.* 699.)
(2 *T. R.* 63.)

Decided:—That the consignor of goods may stop the goods *in transitu* before they get into the hands of the consignee on the bankruptcy or insolvency of the consignee; but if the consignee has assigned the bill of lading to a third person for a valuable consideration *bonâ fide* without notice, the right of the consignor is gone.

Notes.—"Stoppage *in transitu,*" which is a prevention of wrong by a mere personal act, is the right which a vendor having sold goods on credit has to stop them on their way to the vendee, *before they have reached him,* on his becoming bankrupt or insolvent. If the goods have actually reached the vendee, or an agent on the part of the vendee, then the right is gone, as the very name "stoppage *in transitu*" imports. The rule to be collected from the cases is stated to be that the goods are "*in transitu*" so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission. But that if after their arrival at the place of destination they be warehoused with the carrier, whose store the vendee uses as his own, or even if they be warehoused with the vendor himself, and rent be paid for them, that puts an end to the right to stop "*in transitu.*" It is not necessary, in exercising the right of stoppage *in transitu,* that the vendor should actually seize the goods, for notice to the carrier or other forwarding agent is enough.

PIGOT'S CASE.

(11 *Rep. at fol.* 27A.)

Decided:—That if an obligee himself alters a deed, either by interlineation, addition, erasing, or by drawing a pen through the line, &c., although it is in words not material, yet the deed is void; but if a stranger without his privity alters the deed by any of the said ways in any points not material, it shall not avoid the deed.

MASTER v. MILLER.

(*S. L. C., Vol. I., p.* 796.)
(4 *T. R.* 340.)

Decided:—That an unauthorized alteration in a bill of exchange after acceptance, whereby the payment would be accelerated, avoids the instrument, and no action can be maintained upon it, even by an innocent holder for valuable consideration.

ALDOUS v. CORNWELL.

(*L. R.* 3 *Q. B.* 575.)

Here a promissory note made by defendant expressed no time for payment, and while it was in the possession of the payee (the plaintiff) the words "on demand" were

added without the assent of the maker. This action was now brought on the note; and on the plea of the defendant that he did not make it, *Decided*:—That as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did *not* affect the validity of the instrument.

Notes on these three Cases.—Pigot's Case related only to deeds, but *Master* v. *Miller* extended its doctrine as far as regarded material alterations to bills of exchange, and subsequent cases have applied it indiscriminately to all written instruments whether under seal or not. However, it is not now entirely good law, for such an immaterial alteration in a deed or other writing as filling in a date where a blank is left, though done by the party, does *not* at all vitiate it. *Aldous* v. *Cornwell* is cited as being a recent case, and plainly shewing that a mere immaterial alteration in a negotiable instrument does *not* affect it. If a material alteration is made in an instrument by consent, the instrument is a new contract requiring a new stamp, unless such alteration was made to correct a mistake and make the instrument what it was originally intended to be (Sm. C. L. Man. 4th edit. 253).

WAUGH v. CARVER.

(*S. L. C., Vol. I., p.* 838.)
(2 *Hen. Blackstone*, 235.)

Here certain ship-agents at different ports entered into an agreement to share in certain proportions the profits of their respective commissions and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them, &c. *Decided*:—That by this agreement they became liable as partners to all persons with whom either contracts as such agent, though the agreement provides that neither shall be answerable for the acts or losses of the other, but each for his own; for he who takes the general profits of a partnership must of necessity be made liable to the losses, and he who lends his name as a partner becomes as against all the world a partner.

COX v. HICKMAN.

(8 *H. L. Cas.* 268.)

Here S. & S. becoming embarrassed had executed a deed assigning their property to trustees whom they empowered to carry on the business under the name of the Stanton Iron Company, and do all necessary acts, with power to the majority of the creditors assembled at a meeting to make rules for conducting the business or to

put an end to it, and after the debts had been discharged the property was to be re-transferred by the trustees to S. & S. Two of the creditors, C. and N., were named amongst the trustees; C. never acted; N. acted for six weeks, and then resigned. Some time afterwards the other trustees who continued to carry on the business became indebted to H., and gave him bills accepted by themselves "per proc. the Stanton Iron Company."—*Held*:—That there was no partnership created by the deed, and that consequently C. & N. could *not* be sued on the bill as partners in the company.

Notes on these two Cases.—Waugh v. *Carver* is given in 'Smith's Leading Cases,' as the leading case on the question of what constitutes a partnership, but *Cox* v. *Hickman* is a later case, and perhaps a better authority to quote on the point. Partnership has been defined as "the voluntary association of two or more persons who contribute money, effects, labour, care, or skill for the purpose of carrying on as principals a common undertaking for a lawful object for their common profit" (Sm. C. L. Manl. 4th ed. 194). By 28 & 29 Vict. c. 86, it is enacted that none of the following events shall of themselves constitute a partnership:—

(1.) The advance of money by way of loan to a person engaged in a trade or undertaking upon a contract to receive interest varying with the profits or a share of the profits.

(2.) A contract for the remuneration of a servant or agent of any person engaged in a trade or undertaking by a share of the profits.

(3.) The receiving by a widow or child of the deceased partner of a trader of a portion of the profits by way of annuity.

(4.) The receiving by any person of a portion of the profits of any business in consideration of the sale by him of the goodwill of such business. But in the case of bankruptcy, &c., the lender of any such loan, or the vendor of any such goodwill, is not to be

entitled to recover any such profit as aforesaid until the claims of the other creditors for valuable consideration have been satisfied.

A dormant partner is one who, though not appearing as a partner, yet in reality is one, and he is liable in common with other partners, and a nominal partner is one who, without participating in the profits, yet lends his name to the firm, and he is liable to third parties if his holding out as a partner has come to their knowledge. Though partners are jointly interested, yet, on death of one, his share forms part of his own personal estate, and though on the death of one the legal interest in choses in action survives to the others, yet they are in equity but trustees for the share of deceased partner. The power of one partner to bind the other depends on the ordinary principles of agency, and in the same way that a general agent binds his principal by all contracts within the scope of his agency, so one partner binds the other by all such transactions as are within the scope of the partnership dealings, though the partners may have privately agreed that no such power should exist. Thus, in mercantile partnerships one partner can bind the others by a bill of exchange, though one member of a firm of attorneys would have no such power; but a partner cannot bind his firm by a deed unless he is authorized by deed so to do. A partner is not liable on contracts entered into before he became a member of the firm.

A partnership may be dissolved:

1. By effluxion of time.
2. By mutual consent.
3. If a partnership at will by a notice, unless such dissolution would be in ill faith, or would work an irreparable injury.
4. By a general assignment by one or more partners, or by execution on the partnership effects by a creditor of one of the partners, or by an assignment of his share in the business, or by his bankruptcy, or outlawry, or attainder for treason or felony.
5. By death of a partner.
6. By marriage of a female partner, and
7. By decree of a Court of Equity, which will be granted on

any of the following grounds.—(*a*) Where the partnership originated in fraud, misrepresentation, or oppression; or (*b*) Where it cannot be carried on at all, or at least according to the stipulations in the articles, or without injury to all the partners; or (*c*) Where one of the partners is permanently insane, or incapable, or guilty of gross misconduct as partner. (See Sm. C. L. Manl. 4th ed. 207.)

CUTTER v. POWELL.

(*S. L. C., Vol. II., p.* 1.)
(6 *T. R.* 320.)

Here the defendant gave to one Cutter deceased a note as follows:—"Ten days after the ship *Governor Parry*, myself master, arrives at Liverpool I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate to the said ship from hence to the port of Liverpool, Kingston; the 31st of July, 1793." Cutter died during the voyage, and this action was brought by his representatives. *Decided*:—That deceased not having proceeded, continued, and done his duty for the whole voyage, nothing could be recovered by his representatives.

Notes.—The general rule is that while the special contract remains unperformed, no action of *indebitatus assumpsit* can be brought for anything done under it. There are, however, exceptions, and it is often very difficult in practice to decide when and when not an action can be maintained.

BICKERDIKE v. BOLLMAN.

(*S. L. C., Vol. II., p.* 45.)
(1 *T. R.* 405.)

Decided:—That notice of dishonour of a bill is not necessary if the drawer had no effects in the hands of the drawee, so that he could not be injured for want of notice.

Notes.—The result of this decision may be illustrated thus:—A. draws on B., who accepts for A.'s accommodation, and on presentment to B. the bill is dishonoured; to entitle the holder to sue A., it is *not* necessary to give him any notice of dishonour, because as he had no assets in B.'s hands, he cannot possibly be injured. But it has been decided that the principle of this case must not be extended, and notice must be given if the drawer have reason to expect that some third party will provide for payment of the bill; and if the drawer had effects in the drawee's hands at the time when the bill was drawn, he does *not* lose his right to notice, although before the time of payment he may have ceased to have any.

The proper time for giving notice of dishonour when the person lives at or near the place of dishonour, or where the giver of notice himself received notice, is such a time that it may be received by the expiration of the day after the dishonour, or after the time when the giver of the notice himself received notice, for each indorser "has his day" for giving notice. When the person is not living at or near the place it is enough to give notice by the post of the next post day, or when it is a foreign bill by the next ordinary conveyance. When the bill is at a banker's the banker has a day to give notice to customer, and the customer, another day to give notice to the prior parties.

A cheque must be presented for payment by the day after the day of its receipt, or if the parties live at a distance, forwarded for

presentment within that time, and the result of this time not being observed is to exonerate the drawer if the banker fails in the meantime having assets of the drawer. It is not necessary to give notice of dishonour of a cheque if there were no sufficient effects at the time when the drawer would naturally expect the cheque to be presented and the drawer had no reasonable expectation that cheque would be cashed.

I'ANSON v. STUART.

(*S. L. C., Vol. II., p.* 57.)
(1 *T. R.* 748)

Decided :—That to print of any one that he is a swindler is a libel and actionable, for it is not necessary, in order to maintain an action of libel, that the imputation should be one which if spoken would be actionable as a slander.

Notes.—The student is recommended to turn to this case and read the facts—too long to be stated here—as though there is no particular legal importance in them, they will, without doubt, impress the case firmly on his memory. The legal point to remember in this case is that writing may constitute a cause of action as a libel, when the words if only spoken would not without proof of special damage. Words which are slanderous in themselves, *i.e.* will support an action without any proof of special damage, are words which impute (1) some offence punishable by the criminal law, or that a man has been actually convicted; or (2), some misconduct or incapacity in the plaintiff's trade, profession, or office; or (3), that the plaintiff actually labours under a contagious disorder, the imputation of which may exclude him from society.

CLAYTON v. BLAKEY.

(*S. L. C., Vol. II., p.* 103.)
(8 *T. R.* 3.)

Decided:—That though by the Statute of Frauds (29 Car. 2, c. 3, s. 1), it is enacted that all leases by parol for more than three years shall have the effect of estates at will only, such lease may be made to enure as a tenancy from year to year.

DOE d. RIGGE v. BELL.

(*S. L. C., Vol. II., p.* 98.)
(5 *T. R.* 471.)

Decided:—That, although a lease is void by the Statute of Frauds (29 Car. 2, c. 3, s. 1), and therefore the tenant holds not under the lease, but as tenant from year to year, yet such holding is governed by the terms of the lease in other respects.

Notes on these two Cases.—The principle upon which the tenancy, which by 29 Car. 2, c. 3, s. 1, it is declared, not being created by writing, shall be only a tenancy at will, is converted into a tenancy from year to year, is, that originally in accordance with the statute it is but an estate at will, but afterwards by the payment of rent, or from other circumstances indicative of an intention to create such yearly tenancy, it becomes converted into a tenancy from year to year, to which latter certain tenancy the Courts always lean in preference to the uncertain tenancy of an estate

at will. For the rule to determine when a tenancy is at will, and when for years, see *Richardson* v. *Langridge* (Indermaur's Con. & Eq. Cas. p. 1).

The decision in *Doe* d. *Rigge* v. *Bell*, that the holding is regulated by the other terms of the lease, arises rather as a matter of evidence than of law. That case is where the lease itself was void, but the same rule applies to the case of a tenant holding over after the expiration of his term under a valid lease, for there, after there has been a payment and acceptance of subsequent rent, the law, in the absence of any evidence to the contrary, implies that he continues to hold on such of the terms of the previous demise as are applicable to a tenancy from year to year.

DOVASTON v. PAYNE.

(*S. L. C., Vol. II., p.* 132.)
(2 *Hen. Blackstone*, 527.)

This was an action of replevin for taking plaintiff's cattle, and to an avowry that defendant was seised in fee of the *locus in quo*, and took the cattle damage feasant, it was pleaded that the *locus in quo* lay next a public highway, and the plaintiff's cattle '*being in the said highway*' escaped into the *locus in quo* through the defect of the fences, and to this plea there was a special demurrer. *Decided*:—That the plea ought to shew that the cattle were *passing* on the highway when they escaped, and that it was *not* sufficient to state that *being* in the highway they escaped.

Notes.—This may perhaps be considered by some students as rather a quibble, but the reason is apparent, viz.: that the highway was only for cattle to pass along, and that they had no right to remain and be there; and, of course, in all pleadings there must be certainty.

ELWES v. MAWE.

(*S. L. C., Vol. II., p.* 153.)
(3 *East*, 38.)

Decided:—That although tenants may remove fixtures erected for the purposes of their trades, yet tenants in agriculture cannot remove fixtures erected for the purposes of husbandry.

Notes.—This case is useful to cite on the general principle of fixtures, but the law contained in it is now altered, for 14 & 15 Vict. c. 25, s. 3, provides that buildings, engines, &c., &c., erected for agricultural purposes, *with the consent in writing of the landlord*, shall remain the property of, and removable by, the tenant, so that he do no injury in the removal thereof; but before removal one month's notice must be given to the landlord, who has the option of purchasing.

The law, then, as to fixtures shortly stands thus: The tenant may remove those erected for the purposes of trade or ornament, or agricultural fixtures, as provided by the above statute; but all such fixtures must be removed before the expiration of the term, or during such further period as the tenant holds under a right to consider himself as tenant, otherwise they become the property of the landlord, being considered as a gift in law to him.

After conflicting decisions it appears to be now settled that a mortgage of leasehold premises, together with trade fixtures, does require to be registered as a bill of sale to be valid against trustees in bankruptcy, and that such a mortgage is quite different from a mortgage by a freeholder of fixtures with the freehold. There the title to the land and fixtures is identical, for the fixtures belong to the landlord simply as part of the land, and it is for this reason that such a mortgage does not require registration (*Ex parte Daglish*, 42 L. J. (N.S.) Bkptcy. 102).

WAIN v. WARLTERS.

(*S. L. C., Vol. II., p.* 221.)
(5 *East*, 10.)

Decided:—That by the word "agreement" in the Statute of Frauds (29 Car. 2, c. 3, s. 4), must be understood not only the promise itself, but also the consideration for the promise; so that a promise appearing to be without consideration on the face of the written engagement, it was *nudum pactum*, and gave no cause of action.

Notes.—This decision is now subject to the statute 19 & 20 Vict. c. 97, s. 3, which provides that a guarantee shall not be invalid by reason only that the consideration does not appear in writing, or by necessary inference from a written document. But of course there must even here be a consideration, though it need not appear in the written instrument.

In the case also of bills of exchange and promissory notes it is not necessary that the consideration should appear on the face of the instrument.

DALBY v. INDIA AND LONDON LIFE ASSURANCE COMPANY.

(15 *C. B.* 365.)

Decided:—(1) That the contract of life assurance is a contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, and that it is not a mere contract of indemnity, as policies against fire and marine risks.

(2) That the interest necessary under 14 Geo. 3, c. 48, s. 3, is an interest at the time of effecting the insurance, and not at the time of recovery of the money; therefore although at the time of recovery the interest is gone, yet if at the time of effecting the insurance the person effecting it had a proper interest, he can recover.

HEBDON v. WEST.

(3 *B. & S.* 579.)

Decided:—That, where there are several policies effected with different offices, the insured can recover no more from the insurers, whether on one policy or many, than the amount of his insurable interest.

Notes on these two Cases.—The case of *Dalby* v. *India and London Life Assurance Company* distinctly overrules that of *Godsall* v. *Boldero* (9 East, 72), (which will be found set out in 'Smith's Leading Cases,' vol. ii. p. 237,) where it had been, in fact, decided

that life, like fire assurance, was but a contract of indemnity. The above case is one of the greatest importance, as plainly laying down that if a person has an interest at the time of effecting the life policy, he can afterwards recover, although his interest has gone; thus, if a creditor insures his debtor's life, although he is afterwards paid, yet he can recover from the insurance office.

It should be mentioned that the statute (14 Geo. 3, c. 48) referred to in the above case, does not extend to prevent individuals from effecting insurances upon their own lives, provided that it be done *bonâ fide*.

A wife has an insurable interest in the life of her husband, but, a husband, parent, or child has no insurable interest in the lives of a wife, child, or parent, unless he or she has some interest in property dependent on their lives. By the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93, s. 10), a married woman may effect a policy of insurance upon her own life, or the life of her husband, for her separate use; and a policy of insurance by a married man on his own life, if so expressed on its face, may enure as a trust for the benefit of his wife and children, or any of them, and as a trust not be subject to the control of the husband or his creditors. But if it was effected for the purpose of defrauding creditors they are entitled to receive out of the sum secured an amount equal to the premiums paid.

Perfect good faith is necessary in effecting a policy of insurance, and any fraud, misrepresentation, or even non-communication of material circumstances, by the party insuring or his agents, will render the policy void.

GEORGE v. CLAGETT.

(*S. L. C., Vol. II., p.* 113.)
(7 *T. R.* 359.)

Decided:—That if a factor sells goods as his own, and the buyer does not know of any principal other than the factor, and the principal afterwards declares himself, and demands payment of the price of the goods, the buyer may set off any demand he may have on the factor against the demand made by the principal.

Notes.—But if the buyer have the means of knowing that the party with whom he contracts is but an agent, this rule does not apply.

It may be well to note here the powers of factors over goods entrusted to their possession. At common law the mere position of principal and factor confers a power to sell at such times and prices as the factor may in his discretion think best, but does not confer any power to pledge. This was considered by the mercantile community an undue restriction of the operation of commerce, and in consequence two statutes were passed, 6 & 7 Geo. 4, c. 94, and 5 & 6 Vict. c. 39, commonly known as the "Factors Acts," the effect of which statutes taken conjointly has been shortly stated as follows:—

"First. Where goods or documents for the delivery of goods are pledged as a security for present or future advances with the knowledge that they are not the property of the factor, but without notice that he is acting without authority, in such case the pledgee acquires an absolute lien.

Secondly. Where goods are pledged by a factor *without notice* to the pledgee that they are the property of another, as a security for a pre-existing debt, in that case the pledgee acquires the same right as the factor had.

Thirdly. Where a contract to pledge is made in consideration of the delivery of other goods or documents of title, upon which the person delivering them up had a lien for a previous advance (which is deemed to be a contract for a present advance), in that case the pledgee acquires an absolute lien to the extent of the value of the goods given up." (Chitty's Statutes, 3rd ed. vol. ii. tit. "Factors.")

These statutes do not apply to transactions not mercantile, nor to cases of persons to whose employment a power of sale is not ordinarily incident.

ADDISON v. GANDESEQUI.

(*S. L. C., Vol. II., p.* 320.)
(4 *Taunt.* 574.)

In this case the defendant, being abroad and desirous of purchasing certain goods, came to England and went to his agents, L. & Co. These agents purchased the goods for him from the plaintiffs, he selecting them, and the plaintiffs debited the agents, L. & Co., with the price. *Decided*:—That the plaintiffs could not now recover the price against defendant, having known who the principal was, and yet debited the agents.

PATERSON v. GANDESEQUI.

(*S. L. C., Vol. II., p.* 313.)
(15 *East*, 62.)

The facts in this case were of a similar nature to those of the previous one, and on the trial the plaintiff had been nonsuited. A rule *nisi* was afterwards obtained to set aside the nonsuit, and on argument it was made absolute, the Court considering that there was some doubt whether or not the plaintiff knew of the defendant being the principal. But the following general principles were laid down, agreeing with the previous case:—That if the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another,

elect to give the credit to such agent, he cannot afterwards recover the value against the *known* principal: but if the principal be not known at the time of the purchase made by the agent, it seems that, when discovered, the principal or the agent may be sued, at the election of the seller; unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing, as particularly in the case of principals residing abroad.

THOMPSON v. DAVENPORT.

(*S. L. C., Vol. II., p.* 327.)
(9 *B. & C.* 78.)

Here, Davenport sold goods to one M'Kune, who told him he was buying them on account of another person, *but did not mention the principal's name*, and Davenport did not inquire for it, but debited M'Kune. M'Kune failed, and Davenport sued Thompson, who was the principal, for the price. The verdict was given for the plaintiffs, and was now affirmed on writ of error, it being *decided*:—That the seller might sue the principal for the price, he not having known who the principal was at the time.

Notes on these three Cases.—The above are the leading cases on the subject of principal and agent, and are usually cited together as being very closely connected, and jointly bearing on the point. The case of *George* v. *Clagett* (p. 55) is sometimes confused with these three cases, and for easy reference and consideration with them, it is here placed immediately preceding them. That was a case where the *owner of the goods* employed an agent to *sell*

them, and afterwards declared himself: but these three cases are where goods were *purchased* by an agent, and the point is, who is liable for the price. It is, therefore, evident that *George* v. *Clagett* must not be confused by the student with these three cases.

An agent's authority may be determined in any of the following ways:—

1. By revocation.
2. By the agent's renunciation with principal's consent.
3. By principal's death.
4. By principal's bankruptcy.
5. By fulfilment of the commission.
6. By expiration of time.
7. When the agent is a *feme sole*, by her marriage.

In order to determine the agent's authority by revocation means should be used to make known such revocation as fully as the employment was known. To correspondents express notice should be given, and to strangers a general notice in the *Gazette* (Sm. C. L. Manl. 4th ed. 366).

MANBY v. SCOTT.

(*S. L. C., Vol. II., p.* 396.)
(1 *Sid.* 109.)

Decided:—That the wife's contract does not bind the husband unless she act by his authority.

MONTAGUE v. BENEDICT.

(*S. L. C., Vol. II., p.* 429.)
(3 *B. & C.* 631.)

This was an action against a husband for certain goods—*not* necessaries—delivered to the wife of the defendant. *Decided*:—That as the goods were not necessaries, and there was no evidence to go to the jury of any assent of the defendant (the husband) to the contract made by his wife, the action could *not* be maintained.

SEATON v. BENEDICT.

(*S. L. C., Vol. II., p.* 436.)
(5 *Bing.* 28.)

This was an action against the same defendant as in the previous case. The claim was for certain goods—which were in the nature of necessaries—delivered to the wife of

the defendant. It was, however, shewn that the defendant had supplied his wife's wardrobe well with all necessary articles. *Decided*:—That a husband who supplies his wife with necessaries in her degree is not liable for debts contracted by her without his previous authority or subsequent sanction.

Notes on these three Cases.—Manby v. *Scott* is a very old case which occurred in the reign of Charles II., and seems to be cited in 'Smith's Leading Cases,' in some degree, as a specimen of "that laborious process of investigation to which important questions of law were anciently submitted." The general principle established in that case is, however, still good law; but it must be remembered that with regard to necessaries supplied to the wife, it may not be necessary to shew any specific authority of the husband to charge him, for the wife from her position has an implied authority for that purpose, unless the contrary appears; and in *Seaton* v. *Benedict* the contrary did appear, for the wife was sufficiently supplied with necessaries. It should here be mentioned, that if a man takes a woman to his house and lives with her as his wife, she stands in the same position with regard to her power to charge him as if she were actually married to him.

The whole power which a wife has to bind her husband for necessaries arises from the fact that, during cohabitation, there is a presumption arising from the very circumstances of the cohabitation of the husband's assent to contracts made by his wife for necessaries suitable to his degree and estate; and where the wife is living apart from the husband, there is *no* presumption that she has any authority to bind him, and it must be shewn that from the circumstances of the separation, or the conduct of the husband, she had such authority. When the husband and wife are living separate, the law as to the husband's liability is as follows:—

Firstly. Where they separate by mutual consent, and no allowance is made to the wife, she has an implied authority to bind him for necessaries.

Secondly. Where the husband unjustly expels his wife from the marital roof, or forces her to abandon it by his cruelty, she goes forth with an implied authority to bind him for necessaries.

Thirdly. Where they live separately, the husband allowing and paying the wife a sufficient sum for maintenance, she has no authority to bind him for necessaries.

Fourthly. Where the wife unlawfully and against the husband's consent leaves him, or if she elopes or lives in adultery, she has no implied authority to bind him.

With reference to the husband's liability for the debts of his wife contracted before marriage, formerly he was always so liable, but the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93, s. 12), provides that "A husband shall not by reason of any marriage which shall take place after this Act has come into operation be liable for the debts of his wife contracted before marriage; but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debt as if she had continued unmarried." This act came into operation on 9th August, 1870.

Notwithstanding the very wide words of this section it has been decided that though by it a married woman may be sued, yet she cannot be made a bankrupt, at least not unless she has separate estate (*Ex parte Holland, In re Heneage*, Law J. Notes of Cases, March 7th, 1874).

ROE v. TRANMAR.

(*S. L. C., Vol. II., p.* 468.)
(*Willes*, 682.)

Here it was held that a deed which could not operate as a release, as it attempted to convey a freehold *in futuro*, should nevertheless operate as a covenant to stand seised.

Notes.—The principle which this case carries out is one of great importance, forming, indeed, one of the first rules of construction of all written instruments, viz., "The construction shall be liberal; words ought to serve the intention, not contrarywise."

MERRYWEATHER v. NIXAN.

(*S. L. C., Vol. II., p.* 481.)
(8 *T. R.* 186.)

Decided:—That if A. recover *in tort* against two defendants and levy the whole damage on one, that one cannot recover a moiety against the other for his contribution; though it is otherwise in assumpsit.

Notes.—This decision seems to be only a modification of the maxim, "*Ex turpi causâ non oritur actio,*" and the whole decision may be shortly expressed by saying that as between defendants *ex contractu* the law allows contribution, but not between defendants *ex delicto.*

VICARS v. WILCOCKS.

(*S. L. C., Vol. II., p.* 487.)
(8 *East*, 1.)

In this case it appeared that the plaintiff had been retained by J. O. as a journeyman, and that the defendant had, in discourses with third persons, imputed to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard, and that in consequence of such imputation the said J. O. had discharged plaintiff from his service, and he had thus been much injured.

Decided:—That damage, to be actionable, must not be too remote; and that where special damage is necessary to sustain an action for slander, it is *not* sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander.

LUMLEY v. GYE.

(22 *L. J.* (*N. S.*) *Q. B.* 463.)

This was an action by the manager of one theatre against the manager of another for damages for inducing a singer to break her engagement with him, and the doctrine in *Vicars* v. *Wilcocks*, as above, was urged to frustrate the

action—the damage of course resulting from a wrongful act.

Decided:—That the action could be maintained.

HADLEY v. BAXENDALE.

(9 *Ex.* 341.)

This was an action of assumpsit brought against the defendants as carriers. The plaintiffs, the owners of a mill, finding one of the shafts broken, sent to defendants' office a servant, who informed the clerk there that the mill was stopped, and that the shaft must be sent at once, and the clerk informing him that if sent any day before twelve o'clock it would be delivered the following day, the shaft was sent and the carriage paid. The neglect arose in the non-delivery in sufficient time, whereby the making of a new shaft was delayed several days. Evidence was given of the loss of profits caused by the stoppage of the mill, which was objected to by the defendants as being too remote. *Decided*:—That the loss of the profits could not be taken into account in estimating the damages; and that the damages in respect of breach of contract should be such as may fairly and reasonably be considered either arising naturally, or such as may reasonably have been supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

Notes on these three Cases.—These cases embrace the question of the proper measure of damages in actions of tort and of contract, and the subject being of very great importance a few observations on it may be found useful.

Firstly. *In actions of contract.* The rule in assessing damages here is much more strictly confined than in actions of tort, and generally the primary and immediate result of the breach of contract only can be looked to, thus, in the case of non-payment of money, no matter what amount of inconvenience is sustained by the plaintiff, the measure of damages is the interest of the money only. The principle seems to be in these cases that in matters of contract the damages to which a party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance. Mr. Mayne in his Treatise on Damages (p. 8) says: "It is obviously unfair that either party should be paid for carrying out his bargain on one estimate of its value, and forced to pay for failing in it on quite a different estimate. This would be making him an insurer of the other party's profits without any premium for undertaking the risk."

Now, as to the grounds of damage which will in no case be admissible, they may be classed under the general head of remoteness "Damage," says Mr. Mayne (p. 26), "is said to be too remote when, though arising out of the cause of action it does not so immediately and necessarily flow from it as that the offending party can be made responsible for it." And it is here that the case of *Hadley* v. *Baxendale* (which is one intended to settle the law upon the subject, and which has since been acted upon), comes in, laying down the rule as given above in that case, and which rule was shortly stated by Blackburn, J., in *Cory* v. *Thames Iron Works Co.* (L. R. 3 Q. B. 186) thus: "The damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware of." If the damages are not within this rule, then they are too remote and cannot be admitted.

Secondly. *In actions of tort.* The rule here as to damages is of a very much looser character than in actions of contract, and it naturally is so from the nature of the action. With the one excep-

tion of actions for breach of promise of marriage, the motives or conduct of a party breaking a contract, or any injurious circumstance not flowing from the breach itself, cannot be considered as damages where the action is on the contract, but torts may be mingled with ingredients which will increase the damages to any amount, for a trespass may be attended with circumstances of insult; or, generally, in an action of tort any species of aggravation will give ground for additional damages, and it is in such cases as this that the rule can go no further than to point out what evidence may be admitted, and what grounds of complaint may be allowed for, and the rest must be left to the jury.

Again, however, in considering the grounds of damage which will be admitted here, we must remember that it must not be too remote, and on this point the case of *Vicars* v. *Wilcocks* may be given. That case, however, goes particularly to lay down the rule that the wrongful act of some third party, induced by defendant, could never be taken into consideration in assessing the damage against defendant, for the damage must be not only the natural but also the legal consequence of that. This doctrine, manifestly unjust, after having been shaken by various authorities, seems to be now finally overruled by the above case of *Lumley* v. *Gye*, the effect of which is to alter the rule in *Vicars* v. *Wilcocks*, by allowing that the wrongful act of a third party may form part of the damage where such wrongful act might be naturally contemplated as likely to spring from the defendant's conduct.

As to the time to which any damages whether in contract or tort may be assessed, of course no damages can be given on account of anything before the cause of action arose, and as to damages subsequent to the cause of action, the result of the decisions is stated by Mr. Mayne (p. 59) to be, that such damages "may be taken into consideration where they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action."

For further information on the subject of Damages the student is referred to Mr. Mayne's Treatise on Damages, from which work the above notes are mainly gathered.

NEPEAN v. DOE.

(*S. L. C., Vol. II., p.* 510.)
(2 *M. & W.* 894.)

Decided:—That where a person goes abroad and is not heard of for seven years the law presumes the fact that such person is dead, but *not* that he died at the beginning or the end of any particular period during those seven years.

Notes.—Of course, this presumption of law is liable to be rebutted, and though there is no presumption of law as to the period of death, such a presumption might arise from particular circumstances; but this is matter of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is also no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health on a certain day was alive a short time afterwards (*In re Phené*, L. R. 5 Ch. 139).

DUCHESS OF KINGSTON'S CASE.

(*S. L. C., Vol. II., p.* 679.)
(*Bul. N. P.* 244.)

In this case there were two questions submitted to the judges:—(1) Is the sentence of a spiritual court against a marriage, in a suit for jactitation of marriage, conclusive, so as to stop the counsel for the Crown from proving the said marriage in an indictment for polygamy? (2) Admitting such sentence to be conclusive upon such indictment, may the counsel for the Crown be admitted to avoid the effect of the sentence by proving the same to have been obtained by fraud or collusion? *Decided:*—(1) That the sentence was *not* so conclusive. And (2) That even admitting that it were, yet it might be avoided by shewing fraud or collusion.

Notes.—This case embraces the doctrine of *estoppel*, the definition of which Lord Coke gives thus: "An estoppel is where a man is concluded by his own act or acceptance to say the truth;" but more plainly, it is "an admission, or something treated by the law as equal to an admission, of such a high and conclusive character that the party whom it affects is not permitted to answer or offer evidence against it." Estoppel is of three kinds: (1) By matter of record; (2) By deed, and (3) *In pais*, which latter means, matter of fact.

The doctrine of estoppel does not prevent a deed from being impeachable for fraud or illegality (See *Collins* v. *Blantern, ante*, p. 25).

HOCHSTER v. DE LA TOUR.

(2 *Ell. & Bl.* 678.)

Here there was an agreement to employ the plaintiff as a courier from a day *subsequent* to the date of the writ, and before the time for the commencement of the employment defendant had refused to perform the agreement, and had discharged the plaintiff from performing it; whereupon he had brought this action. *Decided:*—That a party to an agreement may, before the time for executing it, break the agreement, either by disabling himself from fulfilling it or by renouncing the contract, and that an action will lie for such breach before the time for fulfilment of the agreement.

FROST v. KNIGHT.

(*L. R.* 7 *Ex.* 111.)

In this case the defendant had promised to marry the plaintiff on the death of his father; and he had afterwards, during his father's life, announced his absolute determination never to fulfil the promise.

Decided (on the authority of *Hochster* v. *De la Tour*), that the plaintiff might at once regard the contract as broken, in all its obligations and consequences, and sue thereon.

Notes on these two Cases.—The principle decided in *Hochster* v.

De la Tour seems to be one of reason, for when a man is bound to do some act at a future day, and before that day he declares he shall not do it, and refuses to do it, there seems no reason why the cause of action should be delayed until the arrival of that future day. This principle has been recognised and acted on in the case of *Frost* v. *Knight*, given above, overruling the decision of the Court below, which will be found reported in Law Rep. 5 Ex. 322.

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